NO. 47578-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

SHAUN CHRISTINE JOHNSON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01964-7

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Shaun Johnson (hereafter 'Johnson') was driving on a road in rural Clark County when she went off the road on a straight portion of the roadway, and crashed into a ditch. RP 236-38, 241-44, 314, 416. This was a portion of the roadway where there are school bus stops and can have children waiting for the school bus to pick them up. RP 331. It was June 10, 2013 and there was no rain and the roads were dry. RP 291-92. Karen Nelson was driving on the same road a distance back from Johnson and saw dust from the gravel on the side of the road as Johnson's car went off the road. RP 291. Karen Nelson stopped to help at the scene of the accident when she came upon it. RP 292. Ms. Nelson saw "a wreck. A car was – inside of the car was a mess and it was tore up pretty bad." RP 293.

She saw a female driver who complained of arm pain. *Id.* Ms. Nelson tried to calm her down while they waited for AMR to arrive. *Id.*

Another driver, Mark Bugholzer, was driving on the road behind Ms. Nelson when he saw a big cloud of dust. RP 327. He saw a car in the ditch and pulled over to help. RP 328. Mr. Bugholzer went down into the ditch to the wrecked car to see what was going on and he told her to sit there and wait and he called 911. RP 328. Mr. Bugholzer then waited on the side of the road for AMR. RP 332.

Deputy Gosch of the Clark County Sheriff's office arrived on the scene. RP 238-40. Deputy Gosch assisted the medics who were on scene and obtained information to complete an accident report. RP 240. His first contact with the driver was when she was still in the crashed vehicle down an embankment in a grassy area on the side of the road. RP 240. The driver was identified via her driver's license as Johnson. RP 242. Johnson was obviously in pain and uncomfortable; her arm was in a sling and she had an IV line put in. RP 244. Deputy Gosch found her driver's license in her purse inside the vehicle. RP 244. Also inside the purse were two baggies of methamphetamine. RP 244. Deputy Gosch asked Johnson about her methamphetamine use and she admitted she was an addict and had used the prior Saturday. RP 247. Deputy Gosch observed no signs of

Johnson being under the influence of any drugs, though he is not a drug recognition expert. RP 248.

Johnson was injured and AMR gave Johnson pain medication to help with the pain. RP 433-40. Johnson was transported to the hospital by ambulance. RP 249. After the ambulance left, Deputy Gosch waited for a tow truck to arrive. *Id.*

A tow truck driver, Charles Barrett, came to take away Johnson's car. RP 250. Deputy Gosch eventually left as the tow truck driver was wrapping up. RP 251. As the tow truck driver searched the area for debris from the vehicle, he heard a voice calling for help. RP 337, 342. Mr. Barrett went back down the embankment and called out, "is somebody there?" and he heard a voice respond, "yes please, help me." RP 342-43. Through the dense bushes and briars, the tow truck driver found Justin Carey, a 16-year-old boy who had been waiting for the school bus, in the tall grass, unable to move, his legs at an odd angle. RP 343-45. Justin Carey suffered significant injuries and lost his leg as a result of being struck by Johnson's vehicle. RP 555-56.

Justin Carey only remembers waking up and going out to his school bus stop and then waking up four days later in the hospital. RP 574, 576.

Karen Nelson, the first witness on the scene of the accident, testified that she herself is a prior user of methamphetamine and other drugs and that she is familiar with the effects of methamphetamine on a person. RP 301-02. Ms. Nelson testified she saw Johnson immediately after the accident and that Johnson appeared anxious, nervous, unfocused, which were signs to her of methamphetamine use, although she admitted she did not know what a person would act like immediately following a traffic collision. RP 301-03. Nelson also admitted that she did not come forward with her opinion about Johnson's apparent methamphetamine use until after she learned methamphetamine was found in her purse. RP 320.

Detective Luque of the Clark County Sheriff's Office testified about his training and experience and his knowledge of drug recognition and the steps he takes to evaluate a person for impairment by any drug. RP 365-80. Detective Luque performed some tests on Johnson, and made many observations of her at the hospital, where she was being treated for her broken arm after the collision. RP 419-24. Detective Luque testified that a minute dose of methamphetamine causes a delay in judgment. RP 390-92. He explained that in his role, determining whether someone was impaired, he is not always looking for someone who cannot stand or function, but is looking for impairment, which can be the slightest of delays that can cause significant effects on driving. RP 401-02. For an

example, Detective Luque explained that every 1.5 seconds driving at 40 mph, a vehicle travels 90 feet, and if you are delayed in reacting due to drug consumption by even 1.5 seconds, that is a significant portion of the roadway the driver would cover before being able to react. RP 402-03.

Detective Luque explained the 12 step Drug Recognition Expert Exam that he knows how to perform, but explained he did not do the 12 step test with Johnson here. RP 406-07. Johnson was in a hospital bed with a broken arm and Detective Luque did not want to have her do some of the tests. RP 494. Also, he does not need to perform all 12 steps in order to make a call, and no one portion of the tests matters more than another. RP 458-59. During his conversation with her, Johnson told Detective Luque that she dropped a cigarette and picked it up off the floor while driving and that she saw, what she believed to be a 14-year-old boy waiting for the school bus. RP 416-17. She told Detective Luque the methamphetamine in her purse belonged to her and admitted to using methamphetamine on the Saturday (2 days) prior at about 1pm.

Detective Luque observed Johnson to have an elevated heart rate, and slow movements and a blank stare when first asked questions. RP 419. Detective Luque found her response to be delayed and that she had poor dexterity. RP 420-21. He noted no clues on the horizontal gaze nystagmus test. RP 423. He knew Johnson had received 150mg of Fentanyl, a

narcotic analgesic that is quick acting and quick to dissipate. RP 432-34. She also received dilaudid. RP 442. Detective Luque also explained to the jury what happens to a person's pupils when the body is exposed to certain kinds of drugs. He testified that Johnson's pupils were not normal for someone who had received these drugs from the hospital and he believed the methamphetamine and the drugs given by the medical personnel were having an antagonistic effect. RP 442. Detective Luque believed he had probable cause for an impairment in Johnson. RP 459. Detective Luque applied for and was granted a search warrant for Johnson's blood. RP 445-46.

On cross examination, Johnson elicited from Detective Luque that he believed there to be some form of an impairment. RP 461. And on re-direct Detective Luque testified that Johnson was impaired.

During rebuttal closing argument, the prosecutor stated without objection:

> [I]t appears that Defense is conceding the Defendant committed the crime of bail jump. If they're willing to concede that[,] the meth possession is so – even so much clearer than that. Why can't he then – why can't they concede that? I mean is there any doubt, not just reasonable doubt, is there any doubt that the methamphetamine belonged to her? Was it in her purse? That she possessed it? No. And defense didn't even concede that and ask you weigh that. So that should clue you in on where the Defense is coming from.

RP 1019.

Prior to trial, Johnson moved to suppress the evidence of methamphetamine found in her purse and the evidence obtained from the search warrant for her blood. CP 1, 20. At the suppression hearing, Deputy Gosch testified that when he came to the scene of the accident, he was investigating the traffic collision and was not doing a criminal investigation. RP 14-15, 68. When Deputy Gosh first arrived, Johnson was in her vehicle. He asked her for her license and she gave it to him. RP 11, 32. When Deputy Gosch later needed her registration and insurance, Johnson was in the ambulance and she told Deputy Gosch the documents were in her car. RP 12-15. Deputy Gosch looked through Johnson's glove box and could not find her proof of insurance, but did find her registration. Deputy Gosch again asked Johnson about her insurance paperwork and she said it may be in her purse. RP 16. Deputy Gosch then went to her purse to look for her license and proof of insurance and found two bindles of methamphetamine therein. RP 16-18.

The trial court denied Johnson's motions to suppress and found the search of the purse was reasonable under the totality of the circumstances and it was justified by the officer's community caretaking function. RP 48; CP 173. The trial court found the issuing magistrate did not abuse his

discretion in issuing the search warrant for Johnson's blood and that it was issued upon probable cause. CP 167-74.

Johnson was convicted by the jury of Vehicular Assault, Possession of a Controlled Substance- Methamphetamine and Bail Jump. CP 160, 162-63. The jury also came back on a special verdict finding the victim's injuries substantially exceeded the level of bodily harm required in the elements of vehicular assault. CP 161.

Johnson subsequently filed the instant appeal.

ARGUMENT

I. The trial court properly admitted opinion evidence.

a. Invited error prevents Johnson from raising the issue of the trooper's opinion testimony.

Johnson argues the trial court erred in allowing the opinion testimony of Detective Luque and Karen Nelson as to Johnson's use of methamphetamine and impairment from said use. Johnson is prohibited from raising this issue as she invited any potential error. Furthermore, if the Court finds she did not invite the error, the opinion testimony was properly admitted and Johnson's claim should be denied.

Johnson is barred from arguing that Detective Luque's opinion on Johnson's impairment was improperly admitted and is now a basis for reversal under the invited error doctrine. The invited error doctrine

prevents a party who sets up an error at trial from claiming that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). Here, Johnson was the first party to introduce the Detective's opinion on her impairment during the Detective's examination. On direct examination, Detective Luque testified that he believed there was probable cause for impairment. RP at 459. On cross examination by Johnson, defense counsel asked, "Who told you that there was some form of impairment?" and the Detective answered that he believed there to be one. RP 461. This is the first that the detective has affirmatively testified he believed there was impairment. This opened the door to the prosecution further clarifying on re-direct examination.

In *State v. Korum*, 157 Wn.2d 614, 141 P.3d 13 (2006) our state Supreme Court found that the invited error doctrine applied when at trial, defense counsel "opened the door" to the admission of certain evidence. *Korum*, 157 Wn.2d at 647. "A party may not set up error at trial and then complain about the error on appeal. *Id.* (citing *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). Here, Johnson invited this testimony by her cross-examination of the detective. Had she not asked the questions she did of the detective, his testimony would have rested at a belief in probable cause existing as to her impairment. Johnson cannot now complain of this error on appeal.

b. *Quaale* does not prohibit the admission of the opinion evidence.

Johnson argues that under *State v. Quaale*, 182 Wn.2d 191, 198, 340 P.3d 213 (2014), that the evidence from Detective Luque that was admitted at trial was not permissible. *Quaale* does not stand for the proposition that no officer may ever offer opinion evidence, and it is distinguishable from the facts at hand.

This court reviews decisions to admit evidence under an abuse of discretion standard. *State v. Demery,* 144 Wash.2d 753, 758, 30 P.3d 1278 (2001). The trial court is given considerable discretion to determine if evidence is admissible. *Id.* "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." *Id.* However, the trial court has abused its discretion on an evidentiary ruling if it is contrary to law. *State v. Neal,* 144 Wash.2d 600, 609, 30 P.3d 1255 (1996). "An abuse of discretion exists '[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.'" *Id.* (alteration in original) (quoting *State v. Stenson,* 132 Wash.2d 668, 701, 940 P.2d 1239 (1997)). Here, the trial court properly applied the law, considered the arguments of the parties and came to a reasoned and reasonable decision. The trial court did not abuse its discretion.

In *State v. Quaale*, during a traffic stop, the Trooper performed one field sobriety test, the horizontal gaze nystagmus test (HGN), and performed no other tests. From that test alone, at trial, the Trooper testified that "there was no doubt [the defendant] was impaired." *Quaale*, 182 Wn.2d at 195. On appeal, the court held the Trooper's testimony that there was "no doubt" regarding impairment cast an "aura of scientific certainty to the testimony" and it amounted to a prediction of the specific level of drugs present in a suspect. *Id.* at 198-99. The Court found it was the conclusion in "absolute terms" that gave the appearance that the HGN test alone may produce scientifically certain results that was inadmissible opinion evidence. *Id.* at 199.

In coming to its opinion in *Quaale*, the Supreme Court discussed the case of *City of Seattle v. Heatley*, 70 Wn.App. 573, 854 P.2d 658 (1993). In *Heatley*, the officer gave his opinion of impairment based on all of the tests he gave as a whole, which included field sobriety tests, his observations, and physical appearance. *Heatley*, 70 Wn.App. At 576. The Court in *Quaale* found the *Heatley* opinion evidence as proper, but the opinion evidence in *Quaale* was improper because it was solely based on the HGN evidence. *Quaale*, 182 Wn.2d at 201. The Court in *Quaale* upholds the proposition that "a lay witness may express an opinion on

another person's intoxication when the witness had the opportunity to observe the affected person." *Id* (citing to *Heatley*, 70 Wn.App. at 580).

This case is more analogous to *Heatley* than to *Quaale*. In *Quaale*, the officer testified based on HGN alone, and here, the officer did not observe any clues on the HGN. Therefore his opinion was not solely based on the HGN, but rather based on his broad observations of the defendant's behaviors, response time, responses, pupil size, general appearance and interactions with others. This officer's testimony is more in line with that of *Heatley*, which our Supreme Court has cited with approval. Here, the trial court clearly did not make its decision for an untenable reason or on a misapplication of the law, and the evidence was properly admitted.

Johnson next argues this opinion by Detective Luque was an improper opinion on her guilt. ER 704 allows for opinion testimony that embraces an ultimate issue to be decided by the trier of fact. ER 704. "Testimony is not objectionable simply because it involves an ultimate issue." *State v. Hayward*, 152 Wn.App. 632, 651, 217 P.3d 354 (2009) (citing ER 704 and *State v. Demery*, 144 Wn.2d, 753, 759, 30 P.3d 1278 (2001) and *City of Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993))

Opinions on guilt are improper whether made directly or by inference. *State v. Montgomery,* 163 Wash.2d 577, 594, 183 P.3d 267

(2008). Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. *State v. Kirkman,* 159 Wash.2d 918, 927, 155 P.3d 125 (2007). Some areas of opinion, are not appropriate for admission into evidence, such as expressions of personal belief as to the defendant's guilt, the intent of the accused, or the veracity of witnesses. *Id.*

In *Heatley*, the court on appeal discusses that a police officer, despite being specially trained to recognize characteristics of intoxicated persons, is a lay witness who is permitted to express an opinion regarding the sobriety of another person. *Heatley*, 70 Wn.App. at 580 (citing to *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990)). In *Heatley*, the court found the officer's opinion on the defendant's impairment was an opinion that was "otherwise admissible" within the meaning of ER 704. *Id.* The same holds true here. Detective Luque, though he has significant training and experience, can still offer an opinion under ER 704 and *Heatley, supra* and *Murphy, supra*. This holds especially true here as Detective Luque did not perform a formal DRE examination. RP at 463. He used his training and experience to make observations of Johnson and opined that she was impaired, as the police officer did in *Heatley, supra* and *Murphy, supra*.

Johnson's arguments based solely on *Quaale* are not meritorious as *Quaale* is distinguishable from the facts here. Johnson's claim fails.

The State is not arguing defense is barred from raising this issue for failure to object based on *Quaale* below. The State agrees defense objected to the opinion offered on re-direct, after defense had already elicited the same testimony and did not object to it. RP at 461. Therefore, the defense's arguments that counsel was ineffective for failing to object based on *Quaale* are moot and the State is not responding directly to that argument.

c. Witness Nelson properly offered an opinion.

Johnson claims Nelson was improperly permitted to opine that Johnson showed signs consistent with methamphetamine use. This court reviews decisions to admit evidence, including opinion testimony, under an abuse of discretion standard. *State v. Demery,* 144 Wash.2d 753, 758, 30 P.3d 1278 (2001). The trial court is given considerable discretion to determine if evidence is admissible. *Id.* "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." *Id.* However, the trial court has abused its discretion on an evidentiary ruling if it is contrary to law. *State v. Neal,* 144 Wash.2d 600, 609, 30 P.3d 1255 (1996). "An abuse of

discretion exists '[w]hen a trial court's exercise of its discretion is manifestly unreasonable or based on untenable grounds or reasons.'" *Id.* (alteration in original) (quoting *State v. Stenson,* 132 Wash.2d 668, 701, 940 P.2d 1239 (1997)). Here, the trial court properly applied the law, considered the arguments of the parties and came to a reasoned and reasonable decision. The trial court did not abuse its discretion.

Under ER 701, a witness must have personal knowledge of a matter that forms the basis of her opinion and the testimony must be rationally based upon the perception, and the opinion must be helpful to the jury. Here, Nelson testified that she herself used to use methamphetamine. RP 301-02. She testified she had seen others use methamphetamine. *Id.* She was familiar with the effects of methamphetamine on the human body. Without speculating it is difficult to quantify, but it is unlikely the majority of the jurors had personal experience with methamphetamine and thus the opinion of someone who has used it would be helpful to the jury.

A lay person's observation of intoxication is an example of a permissible lay opinion. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citing *Heatley*, 70 Wn.App. at 580). Nelson clearly falls under this long-accepted example from *Montgomery* of a witness testifying to his or her observation of another's intoxication.

The trial court properly considered the evidence rules and case law in deciding this issue. RP 280-81. The trial court's decision is supported by the law. The trial court did not abuse its discretion in allowing Karen Nelson to testify to her opinion. This court should reject Johnson's claim.

II. The trial court properly denied Johnson's motions to suppress.

a. The evidence of methamphetamine found in Johnson's purse was properly admitted.

Johnson next argues the trial court erred in denying her CrR 3.6 motion to suppress the evidence of methamphetamine found in her purse and in the evidence found as a result of the search warrant for her blood. The trial court properly denied Johnson's motions to suppress.

This Court reviews the trial court's denial of a CrR 3.6 suppression motion to determine whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). Here, Johnson does not challenge the findings of facts and thus they are verities on appeal. *See State v. Lohr*, 164 Wn.App. 414, 418, 263 P.3d 1287 (2011). The trial court's conclusions of law are reviewed *de novo*. *Garvin*, 166 Wn.2d at 249.

Here, the trial court found that Deputy Gosch was acting in his community caretaking function when he looked in Johnson's purse to find

her insurance card. At this time Deputy Gosch was not conducting a criminal investigation, as made obvious by the fact that he left the scene and did not arrest or continue investigating even after he found methamphetamine in Johnson's purse. RP 39.

When investigating a traffic collision, it is reasonable for the officer to obtain the driver's license, registration and proof of insurance. An officer who is performing a community caretaking function may justifiably inquire about a person's identity. *See State v. Thompson,* 151 Wn.2d 793, 802, 92 P.3d 228 (2004) (recognizing that "[t]he community caretaking function, which is divorced from the criminal investigation ... allows for ... limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety"). The reasonableness of a "'community caretaking'" stop is evaluated by balancing the competing interests involved in light of all the surrounding facts and circumstances. *State v. Acrey,* 148 Wn.2d 738, 748–49, 64 P.3d 594 (2003). To determine whether a police officer's "encounter with a person is reasonable as part of a routine check on safety, we must balance the 'individual's interest in freedom from police interference against the public's interest in having the police perform a community caretaking function.'" *Acrey,* 148 Wn.2d at 750 (internal quotation marks omitted) (quoting *State v. Kinzy,* 141 Wn.2d

373, 387, 5 P.3d 668 (2000)). If a person is seized, the routine safety check must be "necessary and strictly relevant to performance of the noncriminal investigation" and "'must end when [the] reasons for initiating [the] encounter are fully dispelled.'" *Acrey,* 148 Wn.2d at 750 (quoting *Kinzy,* 141 Wn.2d at 338). This occurred here. Deputy Gosch needed to document the vehicle collision as part of his job duties as a deputy sheriff with Clark County. He therefore needed to see Johnson's driver's license, registration and insurance. Once he completed that, he ended his contact and did not make an arrest of Johnson or plan to go to the hospital to arrest her later for the possession of methamphetamine. RP 39-50. From that evidence, Deputy Gosh was clearly conducting a civil investigation and not a criminal investigation.

When we look at citizen-police encounters initiated for a non-criminal and non-investigatory purpose, like we have here, the question of admission of the evidence that was a result of the contact is determined by "balancing the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" *State v. Mennagar*, 114 Wn.2d 304, 313, 787 P.2d 1347 (1990); *State v. Lynch*, 84 Wn.App. 467, 477, 929 P.2d 460 (1996). In *State v. Lowrimore*, 67 Wn.App. 949, 841 P.2d 779 (1992), it was held to be properly part of an officer's community caretaking function to search

the purse of a mentally unstable person who threatened suicide. In that case, the Court of Appeals distinguished civil detentions and criminal detentions and the rules that apply to each. Specifically, when an individual was being detained due to likelihood of harm to herself or others, an officer may search the individual's purse for his own protection. *Lowrimore*, 67 Wn.App. At 956. Though here, Johnson's purse was not searched for the officer's protection, it was opened to look for identification for Johnson pursuant to the officer's civil responsibility to document traffic accidents.

In *State v. Lynch*, 84 Wn.App. 467, 929 P.2d 460 (1996), the Court upheld entry into a parked or stopped car that had apparently been burgled in order to identify the owner. That is similar to here, where our officer was attempting to officially identify the driver of a vehicle crash. Also, in *State v. Kealey*, 80 Wn.App. 162, 907 P.2d 319 (1995), the search of a lost purse to find its true owner was upheld, and the drugs found within the purse were admissible at trial.

Case law supports what Deputy Gosch did here. This was not an improper invasion of Johnson's privacy. The trial court properly considered the law and came to the correct conclusion that Deputy Gosh was acting in his community caretaking role and the results of the search of Johnson's purse were properly admitted at trial.

b. The search warrant was properly issued and the evidence obtained therefrom was properly admitted.

Johnson claims the search warrant for her blood was improperly issued without probable cause. There was probable cause for the issuance of the warrant and the trial court did not abuse its discretion in upholding the validity and propriety of the search warrant.

Washington Court Rules specifically authorize warrants to search for and seize evidence of a crime, contraband, the fruits of a crime, or things otherwise criminally possessed, weapons or other things by means of which a crime has been committed or reasonably appears about to be committed. CrR 2.3(b). Case law has held that search warrants are the favored means of police investigation, and supporting affidavits or testimony must be viewed in a manner which will encourage their continued use. *U.S. v. Harris*, 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971); *U.S. v. Ventresca*, 380 U.S. 102, 108-09, 13 L. Ed. 2d 284, 85 S. Ct. 741 (1965). When a search warrant is properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743, *cert. denied*, 457 U.S. 1137 (1982); *State v. Smith*, 50 Wn.2d 408, 314 P.2d 1024 (1957); *State v. Trasvina*, 16 Wn.App. 519, 557 P.2d 368 (1976). A magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed

for abuse of discretion. This determination should be given great deference by a reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). And further, doubt as to the existence of probable cause will be resolved in favor of the warrant. *State v. J-R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988). In reviewing the search warrant affidavit and making a determination as to whether to authorize the search warrant, the magistrate is to operate in a common sense and realistic fashion and is entitled to draw common sense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999).

In determining the validity of a search warrant, the court considers whether the affidavit, on its face, established probable cause. *State v.Perez*, 92 Wn.App. 1, 4, 963 P.2d 881 (1998). A search warrant may issue only upon a determination of probable cause, based upon facts and circumstances sufficient to establish a reasonable inference that criminal activity is occurring or that contraband exists at a certain location. *State v. Cole,* 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An affidavit is sufficient to support probable cause if it contains information from which an ordinarily prudent person would conclude a crime has been committed and evidence of a crime can be found at the place to be searched. *Id.* The standard of probable cause is governed by the probability, rather than a

prima facie showing, of criminal activity. *In re Pers. Restraint of Yim*, 139 Wn.2d 581, 594-95, 989 P.2d 512 (1999) (quoting *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981)). The determination of probable cause is given great deference. *Id.* (quoting *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). Affidavits are to be read as a whole, in a common sense, non-technical manner, with doubts resolved in favor of the warrant. *State v. Griffith*, 129 Wn.App. 482, 120 P.3d 610 (2005) (citing *State v. Castro*, 39 Wn.App. 229, 232, 692 P.2d 890 (1984)). The determination of probable cause is reviewed for an abuse of discretion. *Id.* (citing *State v. Estorga*, 60 Wn.App. 298, 303, 803 P.2d 813 (1991)).

Johnson argues that the trial court abused its discretion in finding the search warrant for Johnson's blood was properly authorized. There was ample probable cause for the trial court to uphold the issuance of the search warrant and the magistrate did not abuse its discretion in issuing it. Johnson had just been in a serious car accident, running her car off the road for no apparent reason on a straight portion of the roadway during daylight hours. Then, she is found to have methamphetamine in her purse, admits to being an addict and having used within a prior few days. "Probable cause exists if the affidavit supporting the warrant describes facts and circumstances sufficient to establish a reasonable inference that a person is involved in criminal activity and that evidence of the criminal

activity can be found at the place to be searched." *State v. Martines*, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015) (citing *State v. Thien*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) and *State v. Kalakosky*, 121 Wn.2d 525, 536, 852 P.2d 1064 (1993)).

In Johnson's case, police clearly had probable cause and the issuing magistrate properly used its discretion and issued a search warrant for Johnson's blood. There was a reasonable inference that she was involved in criminal activity. Because the search warrant was supported by probable cause, the trial court properly allowed admission of the blood results. Johnson's claim should be denied.

Furthermore, admission of the presence of methamphetamine in the defendant's blood would be harmless error, if error at all, because of the previously recited facts. In determining whether such error is harmless beyond a reasonable doubt, this Court applies the overwhelming untainted evidence test. *State v. Mayer,* ___ Wn.2d ___, 362 P.3d 745, 754 (2015). Here, the jury already knew the defendant was in possession of methamphetamine, was an addict and admitted to using recently. The corroborating evidence of the presence of the methamphetamine was not stronger than the confession to having used it and there is overwhelming untainted evidence of this fact. Johnson's claim the search warrant was

improperly issued should be rejected, and if it was, the evidence as to her guilt was overwhelming.

III. The jury instructions were proper.

Johnson alleges the jury instructions for vehicular assault omitted an essential element of the crime, one of negligence. The jury instructions given by the court were proper, as negligence is not an element of the crime of vehicular assault. Furthermore, Johnson did not object to the instructions given and in fact proposed a similar instruction, omitting negligence from the to-convict. Johnson cannot raise error that she created on appeal.

The invited error doctrine prevents a party who sets up an error at trial from claiming that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). Johnson proposed a substantially similar jury instruction on this. CP 125. Johnson did not request an element of negligence appear in the to-convict instruction for vehicular assault. *Id.* The only difference between Johnson's proposed instruction and the one given is that Johnson proposed one with alternative means of being under the influence and driving with a disregard for the safety of others. *Id*; CP 149. The State did not proceed under the second alternative and thus it was not proper to give it. But otherwise, the instruction was the same as the one given by the court. Johnson did not

request nor propose an instruction which included an element of negligence, and she cannot now complain of it on appeal.

Nevertheless, negligence is not an element of the crime of vehicular assault and therefore Johnson's claim fails on the merits. Johnson cites to *State v. Lovelace*, 77 Wn.App. 916, 895 P.2d 10 (1995) to support her argument that negligence is an essential element of the crime of vehicular assault. However, this case does not hold for that proposition. It holds that the defendant's operation of the vehicle being the proximate cause of the substantial bodily harm is necessary for the evidence to be sufficient. This was included as an element in the to-convict instruction. CP 149. The instructions complied with *Lovelace*. Furthermore, after the *Lovelace* decision, the Supreme Court issued *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995), which Johnson fails to cite for this proposition, yet which is nearly directly on point.

In *State v. Rivas*, our state Supreme Court analyzed the history of the vehicular homicide statute since its inception in 1937 in order to answer the question of whether the State must prove a causal connection between a driver's intoxication and the injury to the victim in a vehicular homicide case. *Rivas*, 126 Wn.2d at 446-47. The Court also addressed statutory interpretation and the effect of *State v. MacMaster*, 113 Wn.2d 226, 778 P.2d 1037 (1989). After considering this issue and the history of

the jurisprudence in our State, the Supreme Court concluded that the Legislature may create strict liability crimes and did so in creating the vehicular homicide statute. *Rivas*, 126 Wn.2d at 452. The vehicular homicide statute and the vehicular assault statute have the same language save for the level of injury required (death versus substantial bodily harm). It is clear from this Supreme Court authority that the instructions given to the jury and the information clearly set forth the proper elements as required by the Legislature. Johnson's argument that negligence is an additional element of the crime has been discussed and rejected by the Supreme Court in *Rivas, supra*. Johnson's claim the jury was improperly instructed and she was improperly notified of the elements of the crime of vehicular assault have no merit.

IV. The information included all essential elements of the crime.

Johnson alleges for the first time on appeal that the information was deficient for failing to include a negligence element in the vehicular assault. Johnson's claim is without merit and should be denied.

An information must include all essential elements of a crime in order to afford notice to an accused of the nature and cause of the accusation against him. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). As Johnson is challenging the sufficiency of the information for

the first time on appeal, the information shall be construed "quite liberally." *State v. Moavenzadeh*, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (quoting *State v. Hopper*, 118 Wn.2d 151, 156, 822 P.2d 775 (1992)). Johnson cites to *State v. Lovelace*, 77 Wn.App. 916, 895 P.2d 10 (1995) and *State v. McAllister*, 60 Wn.App. 654, 806 P.2d 772 (1991) to support her contention. However, the Supreme Court's opinion in *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995) controls here.

In *Rivas, supra*, the Supreme Court addressed the vehicular homicide statute, which has most of the same elements of vehicular assault, just a differing level of harm required, and determined that this crime was a strict liability crime and thus a mens rea, like negligence, was not required. *Rivas*, 126 Wn.2d at 452. Therefore, negligence is not an essential element of the crime of vehicular assault and did not need to be included in the information.

Johnson's claim the information was lacking due to its exclusion of an element of negligence fails. Her claim should be denied.

V. The prosecutor did not commit misconduct.

Johnson alleges prosecutorial misconduct for statements the prosecutor made during closing argument. The prosecutor did not commit misconduct during closing argument, and any potential misconduct was

not so flagrant and ill-intentioned as to have denied Johnson a fair trial. Johnson's claim of prosecutorial misconduct is without merit.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory,* 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor's comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). Contextual consideration of the prosecutor's statements is important. *Burton*, 165 Wn.App. at 885.

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

> Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial

> likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

Though the statements by the prosecutor were inartfully stated, they did not rise to the level of misconduct. This is first evidenced by the fact that the defense did not object. The argument, as heard by Johnson at trial and in its entire context, did not appear to be improper as they sat in court listening to it. The prosecutor attempted, possibly inartfully, to explain that there was proof beyond a reasonable doubt despite potential holes in the investigation police conducted, which is what defense focused on in its closing argument. Furthermore, this argument, even if it was improper, did not rise to the level of flagrant and ill-intentioned misconduct that would require reversal. It was curable by an instruction to the jury to disregard the prior statement, and there is not a substantial likelihood the misconduct affected the jury verdict. As jurors are presumed to follow the Court's instructions, this statement could have been stricken.

Even if this statement did rise to the level of misconduct, it was harmless beyond a reasonable doubt. The evidence was overwhelming that Johnson drove the vehicle, admitted to using methamphetamine less than 48 hours prior, had the presence of it in her blood, drove off the straight

portion of a road, hit a person and had no recall that she had hit the person, and had methamphetamine in her purse in her vehicle, and two witnesses properly testified she appeared impaired. The evidence was overwhelming, all of it untainted, and the closing argument did not improperly influence the verdict in this case. Johnson's claim of prosecutorial misconduct should be denied.

CONCLUSION

Johnson's assignments of error lack merit. The trial court should be affirmed in all respects.

DATED this 12th day of January 2016.

Respectfully submitted:

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Clark County, Washington

By: _____
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CLARK COUNTY PROSECUTOR

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